BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the matter of	)	
	)	
Procedures for Reimbursement of Airports,	)	
On-Airport Parking Lots and Vendors	)	**Docket FAA-2001-11172**
of On-Airfield Direct Services to	)	
Air Carriers for Security Mandates	)	
	)	
14 CFR Part 154, Notice No. 154	)	

COMMENTS
OF
SCIS AIR SECURITY CORPORATION

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Dated: January 22, 2002

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By Notice of Proposed Rule Making (NPRM), dated December 21, 2001, the Federal Aviation Administration (FAA) proposed procedures for reimbursement for Airports, Airport Parking Lot Operators, and Vendors of "on-airfield direct services to air carriers" (Vendors). These comments are submitted in response thereto on behalf of its affiliated company SCIS Air Security Corporation. ("Air Security").

Section 121 of the Aviation and Transportation Security Act (ATSA) authorized the FAA to reimburse airports, airport parking lot operators, and vendors for certain costs associated with the increased security measures implemented after September 11, 2001. That statute did not appropriate the $1.5 billion authorized therein. Supplemental legislation has appropriated funds for the reimbursement of airports. While there is no

legislation pending that would appropriate funds for vendors, several Members of Congress have committed to introducing and supporting such legislation.

Air Security was created by Sky Chefs' parent corporation[1] between October 18 and 20, 2001, in response to Security Directive 108-01-10D. The FAA determined that additional procedures were required to insure that the catering of an aircraft was not a path through which contraband could be introduced to an otherwise secure aviation system. In addition to these "search and seal" procedures, the FAA's Security Directive mandated that the individuals performing these steps could not be employed by the food services company. Air Security was created to meet this requirement. A new organization was created within 48 hours. It was necessary to recruit and hire people who had special knowledge of the FDA food safety standards and those who could perform the FAA mandated procedures without contaminating the food. Specific employment terms and structures were established to insure that the workers and management of Air Security would remain constant over time. Thorough, thoughtful procedures were designed and defined to meet the complex and also conflicting requirements of the FAA and FDA. These procedures were incorporated in the employee training programs and were translated into forms, tags and other hard evidence to prove that the necessary steps had been completed and to provide an on-going record. **Every**

[1] Sky Chefs is a major provider of food services to airlines.

dollar expended in the creation of Air Security (personnel costs, equipment, consulting fees, legal fees , etc.) was the direct result of Security Directive 108-01-10D.

FAA field and headquarters personnel reviewed Air Security's organization, personnel, standards and procedures. Within days literally, the FAA's directive became reality at 77 locations around the country. Air Security has agreements with 101 airlines and is growing its business. As a creature of an FAA Security Directive issued as a result of the September 11 tragedy, its comments of this NPRM should be carefully considered.

Air Security does not hold a FAA certificate; consequently, it is not privy to FAA security directives, plans or amendments thereof under 14 CFR Part 107 and 108.[2] Air Security is authorized to be on the airport by virtue either of its status as an airline vendor (the carrier provides the Part 108 authorization for access of the SIDA) at many airports or as an airport tenant (the airport issues the SIDA badges under Part 107) at some airports. Thus, when the FAA changes the security regime, Air Security does not receive the FAA's new directive directly, but must rely on the information communicated to

[2] "Security directives, emergency amendments, orders, regulation approved airport and air carrier security programs, contingency measures and implementing instructions" are the FAA's full list of possible documents monitored by the FAA that may communicate the agency's security requirements. These comments, for brevity purposes, will not repeat this litany every time that reference is made to some FAA mandate; however, we request that the FAA assume that the full list be considered as appropriate.

them by the airline and/or the airport. Particularly as to the transmission of information by the airline, which is their customer at every airport the company serves, the source of information about the new FAA position or interpretation is not the airline security organization. Rather Air Security staff person, who works directly with each airline, usually communicates with someone in the contract administration or food services organization. The Security Directives that the company receives are almost never a hard copy of the FAA most recently issued paper, but rather, typically are orally conveyed. That airline direction may include its interpretation of the FAA requirements and may well include the airline's policy developed in response to an FAA directive. The policy may, and frequently does, incorporate additional procedures or paperwork or specific requirements that were not specifically required in the FAA paper.

Below are the comments of Air Security on the FAA NPRM:

1. §154.3-Definitions Should Include the "Search and Seal" Function.

The definition of "direct air services to an air carrier", found in the NPRM preamble, includes an extensive list. It, however, does not mention the one function that was 100% mandated by an FAA Security Directive issued after September 11, 2001. Prior to that date there was no "search and seal" function in the delivery of airline food

services, see Security Directive 108-01-10D, nor was there a requirement that a "search and seal" organization be independent of the food services company. Out of an abundance of caution, the preamble to the Final Rule should include the "search and seal" function in its recitation. Clearly Congress intended to include security requirements imposed after September 11; Security Directive 108-01-10D was issued on October 18, 2001, the mandated requirements should be included.

2. §154.3-Definitions "On the Airfield" Should be Clarified.

The "on the airfield" definition indicates that the service, to be eligible, should be delivered in the Airport Operating Area ("AOA"). The clarifying comment suggests that the facility need not be an airport, "so long as the work is performed on the airfield." The example of the repair of an aircraft indicates that "at least part of the service [must] be on the airfield to be covered." Air Security seems to have the necessary qualifying characteristics. Most of its work for the airline is performed at the kitchen (not in the AOA), but as Air Security is required to maintain continuous custody of the carts and food up until the airline accepts delivery, the final step (transfer to the airline) is performed in the AOA. If this interpretation is correct, all of its qualifying costs (all post September 11, 2001) should be eligible.

The preamble to the final rule should, we request, mention this example.

3. §154.4 – Definition- "Eligible Security Requirements" are difficult for Vendors to know.

It is a very common phenomena for a company like Air Security to receive a call from a customer airline and to be told that, under the FAA security plan, "all your trucks need to be padlocked". Because under Part 191 Air Security does not have direct access to the FAA protected documents, the company complied with the airline requirement under the assumption that the requirement was issued by the FAA.

We do not and cannot know whether the FAA mandated the "padlock" through a Security Directive or some other Part 107 or 108 mandate. We do not and cannot know whether the air carrier included the "padlock" requirement as part of its FAA approved plan, or under its interpretation of what an FAA SD required, or through its individual decision that a padlock rule was authorized under its exercise of its air carrier certificate obligations, without a further FAA directive. All that is clear is that the vendor must do what it was instructed to do by the airline.

In that the company has contracts with many airlines, one might assume that, soon after a new SD or other FAA mandate is issued, Air Security would learn from the airlines the precise FAA guidance to its vendors. That is not the case. Whether the PSIs provide slightly different interpretations at the first step in the information chain; or whether the individual airlines, through their own process, randomly create variations in

the interpretation; or whether the simple process of each airline's interpreting how to apply the FAA directive intentionally creates differing practical instructions; or whether the differing messages are the result of the variations caused by our employee's listening skills, a typical FAA SD initiative results in a wide range of specific airline instructions.

This NPRM No. 154 assumes that the vendors receive clear, precise instructions as to what the FAA mandates are and that the vendors can readily discern what the FAA "eligible security requirements" are. This is not so.

Based on these observations, the FAA should allow the vendor to exercise its best judgment as to what may have been required and have the FAA determine what is eligible. If the FAA adopts such an approach, the certification (§154.17, §154.19 and Appendix A) should be modified to reflect this alternative. Air Security cannot, nor can its auditors under proposed §154.23, certify that the expenses are eligible; for under Part 191. Air Security does not have access to the underlying FAA documents. Aside from this obvious in possibility, the outside accounting rule would add to Air Security's costs. The whole purpose of §121 of ATSA and this NPRM are to reduce the expense burden, not to add to it.

4. §154.13 – Distribution: The Application Due Date Should be Amended

Congress has taken exceptional action in authorizing this reimbursement regime. It is unusual for the House, Senate and Administration to agree that private companies should be compensated for regulatorily-mandated expenses. This legislation was enacted, we would argue, because Congress acknowledged that these security measures were extraordinary and that the companies bearing these costs have been negatively impacted to an extreme degree. The expenses at issue have been incurred over the past almost five months, will continue to accumulate until a final rule is issued and will not be offset by any reimbursement until the federal government issues a check under ATSA and appropriation legislation. In the interim each eligible company is financing significant operational and capital expenses; those on-going obligations are producing massive financial pressures on the vendor companies. There is much urgency to the recompense of these expenses; the choice of an application date of June 1, 2002 does not reflect the extreme need for immediate relief.

There is no practical reason to wait until June to submit the request for reimbursement. Each vendor believes that it knows now what the dollar amounts of these added security requirements are and will continue to be. Many of the FAA mandates have been in place since September and October; as best we can tell, few new FAA requirements have been imposed on the vendors recently. The Final Rule should require the vendor to submit their applications on March 1, 2002, because the necessary

supporting information is available today. An extra three months is not required for the vendors to prepare full, substantiated and accurate applications.

If the FAA and/or TSA makes changes to the requirements applicable to vendors between now and the due date or after the due date, the vendors would be willing to amend their requests for reimbursement. Given the recent lack of activity, such security changes are not foreseeable.

Many vendors desperately need these funds. The final rule should be amended to move up the date from June 1, 2002 to March 1, 2002. Although the appropriations legislation has not been enacted, there are several good reasons to advance the due date:

(i) the calculation of the actual total vendor reimbursement needs will facilitate Congress's passage of an appropriation bill;

(ii) the time between the deadline and Congressional enactment can be used to audit the vendor application data; and

(iii) the June 1 date bears no greater relationship to the appropriations process; typically these bills are not passed by that date; however by March, the Administration's proposed appropriations bill has usually been circulated and the Congressional hearings (particularly on this issue) have usually been completed by that date.

We would urge that the final rule adopt as the application date, March 1, 2002 to reflect the urgency of the situation. Private lenders will regard such an action as some indication that relief may be forthcoming.

5. § 154.7 Distribution – Pro Rata Does Not Reflect the Individual Degree of Economic Impact.

The vendors, parking lot operators and airports (we assume that the airports have been redressed in the supplemental appropriation and are not truly at issue here) have all been substantially impacted by the FAA mandates. Many airline vendors have had cost increases of substantial percentages and revenue decreases of equal or greater proportions. Many parking lot operators have seen their revenues go to zero, while others have not had the same negative economic impact. Their cost impacts have also varied based on the proximity of their parking lots to the terminal. The same wide variations in both revenues and costs are likely among airports. The statute, however, only recognizes added expenses; the net financial impact was ignored by Congress' word choice. That drafting decision to examine only expenses should not preclude the FAA's consideration of the range of comparative impact.

A pro rata distribution fails to recognize any such relative equity. Very large institutions, public or private, have greater financial reserves than a small business, would have available. For a marginally capitalized entity, loss of income or increase in costs of even a small percentage can put the enterprise at risk. A purely pro rata distribution rule fails to recognize such comparative impacts. A very large company or airport may experience increased costs in the millions with a revenue base in the billions. Such

entities do not need the same level of financial assistance as a smaller, less secure firm. Under the NPRM proposed formula a very large entity with very large, (in absolute dollar terms), expenses will receive a higher percentage of a pro rata distribution than a smaller airport/business with smaller absolute dollar impacts, even though the latter category may have experienced a greater negative impact and may be at greater risk.

The NPRM's pro rata proposal should be amended to reflect some level of equity. Firms should be required to show the eligible expenses as a percentage of the actual revenues during the relevant period. This percentage would reflect a degree of impact and should help create a prioritization for the distribution. The recompensation basis should not be purely as to percentage, but the severity of the impact and absolute dollar amount both be considered.

6. § 154.7 Distribution – Ten Percent Withholding is an Unnecessary Protection

The NPRM again seems to fail to recognize the financial exigencies that the vendor has experienced and continues to experience as a result of these added rules. Many of the vendors at issue are financially strapped. By withholding ten percent of its reimbursement, the FAA may be denying companies much needed cash. The need for compensation is immediate. The need to protect the ten percent by withholding is neither justified nor the most efficient method of controlling this money.

Today the federal government pays and receives billions of dollars in grants and taxes without withholding. The FAA's own AIP program issues billions of dollars in grant money without retaining some percentage. The expenses here at issue are capable of reliable proof and will be subjected to audit. Payment of the full application amount, subject to audit and refund, is appropriate given the urgency of the situation, the degree to which the government can audit "direct costs" and the relatively small number of companies that are eligible and likely to seek compensation.

7. §154.9 Reimbursement Limits – Relevant Capital Costs must be Included

Many of the FAA directives resulted in substantial capital expenditures; fingerprinting equipment, new security systems, etc. are primary examples of the major impact of the new security regime. The NPRM seems to exclude such relevant costs from consideration. While perhaps an expense, which has an expected life of greater than one year should not be fully recognized, the FAA must acknowledge the validity of these agency-mandated expenses through some amortization rule. The acquisition of new capital assets was among the most burdensome expense imposed as a result of September 11, 2001. An accounting system, which ignores such capital expenses, which fails to reflect the real financial impact of the FAA's actions, which distorts recovery among the various applicants (some companies were required to acquire more assets than others)

and which is not required by ATSA, does not seem to be well advised. Equity can be restored, if the final rule incorporates a reasonable amortization procedure which allows the applicant to include the financial impact of such capital expenditures for the relevant period.

8. § 154.17 – Reimbursement Proof

Documents clearly labeled as directly related to a specific expense are not required under most accounting procedures. While ideally there are records which solely relate to specific, new security expense, such documentation is not required for an accountant to make reasonable, substantiated cost allocations. The NPRM seems to suggest that each vendor opened up a new ledger in the midst of the September 11 crisis and neatly entered each new security expense. That is not realistic.

What did happen was management made a series of quick decisions attempting to implement the FAA mandated requirements as soon as possible. Equipment was purchased, procedures were designed by consultants, fingerprint firms were hired and a whole host of urgent actions were taken to comply with the FAA rules. Some of these expenses were recorded as a line item in a bill; some were included in existing service or supply contracts and reflected as added total costs; and others can be deduced through tested accounting procedures. The final rule should acknowledge that statements by accountants, based on careful reviews, will be accepted if the underlying financial

analysis is supported by standards, normal accounting procedures and adequate documentation. To require ledger-like proof is to deny the reality of the situation and to reward the institution with the most fastidious accountants. The final rule should provide more latitude. Virtually every expense incurred by Air Security is the direct result of a Security Directive.

9. § 154.9 Reimbursement Limits – Offsetting of Surcharges, Fees, etc.

The NPRM suggest that if the applicant imposed a surcharge or fee, "the costs would not be reimbursed." The language of the NPRM is not precise, and therefore this may be an extreme interpretation. A more appropriate statement would appear to be "to the extent that such surcharge or fees exceed costs, then those costs would not be reimbursed."

The economics of this situation are complex. First, the vendors incurred costs beginning on some specific date(s). The added fees or surcharges were imposed days if not weeks, after the expenses were incurred. The added revenues were not collected until weeks, or months after the expenses were paid. This delay factor means that the vendor had to finance the expenses, until (when and if) the added revenues equaled the actual

expenses. At a minimum this delay phenomena should recognize the interest expense related to this situation. Second, it is unlikely that the vendor was able to impose a fee that truly compensated the company for all of the related costs.

While the NPRM considers only the expense aspect of the situation, the surcharge of a fee may have been assessed by the vendor in order to recover indirect costs, financial expenses, lost revenues, penalties imposed through contract cancellation, personnel costs associated with laying off staff, etc. These all constitute valid business reasons for imposing a fee. The company or companies that successfully implemented such fees should not be penalized if the dollars it received under such surcharge exceeded its eligible security costs. An applicant, that imposed a fee, should be allowed to demonstrate what cost targets were used to assess the fee and whether it was able to recover some or all of those costs. Any shortfall between targeted costs and actual recovery should translate to pro rata percentages among the various targets. To the extent that the eligible security target was greater that the apportioned revenues, the vendor should be able to claim that difference.

10. Summary

All of the above comments have been critical of the FAA NPRM. The nature of the process does not lend itself to detailed explanations of when the agency got it right. Much of the proposed rule is quite right. Given that the FAA was permitted an

extraordinarily short period in which to draft complex rules for an ill-defined reimbursement statute, the staff should be commended. The comments provided here reflect strongly held concerns of companies that were impacted by September 11 and the FAA's subsequent security actions. Because these companies balance sheets and operations had concrete examples of impacts, they have unique and valuable insights as to how the NPRM affects each of them. Our comments are not meant to be critical, but intend to express real, substantial concerns. Primary to our response is the idea that the industry is hurting, that there is a sense of financial exigency and that we hope the final rule reflects such urgency.

WHEREFORE, for the above stated reasons, Air Security requests that the FAA include the suggested changes in the final rule.

Respectfully submitted

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J.E. Murdock III

Counsel to
SCIS Air Security Corporation

DATED: January 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this ___day of January, 2002, served the foregoing Comments of LSG Sky Chefs and SCIS Air Security upon those persons listed below in accordance with the FAA's Rules.

Diane Giuliani